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THE DOCTRINE OF CONTRA SPOILIATOREM OMNIA PRÆSUMUNTUR.

We have noticed a number of cases, both in the reports and on trial in the *nisi prius* courts, where the opportunity for the application of the above doctrine, although present, was entirely neglected. It is one of the signs that case law is covering up leading principles. The principle of the law covered by this maxim refers to cases where a man (who willfully places the property of another in a situation where it can not be recovered, or its true amount or value ascertained, by mixing it with his own or *in any other manner*) will consequently be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, even to the extent of surrendering the whole, if his share can not be distinguished, or responding in damages at the highest value at which the property in question can be reasonably estimated.

This principle falls under that part of Blackstone's definition of law, which declares that "the law is made to prohibit what is wrong." The law must meet the emergencies with salutary examples as well in civil as in criminal conduct. We do not say that there are not many cases where the prohibitory force which the law provides is recognized to its fullest extent. What we would be understood as saying is, that the tendency of the courts has been in many cases to lose sight of it, or grow lax in putting that force into effect, and that it is largely due to the failure of the attorneys in those cases to recognize the opportunity for the application of the above principle.

In some instances this principle has been applied with great force, without saying in so many words, that it was the basis of the opinion. A case of this kind is that of Richmond and Jackson v. The D. S. C. R. Co., 40 Iowa, 264. This was an instance of a wilful breach amounting to a fraudulent evasion of a contract which was to run fifteen years. The Dubuque & Sioux City Railroad Company had made a contract with the Dubuque Elevator Company, containing a provision that the elevator company should erect a suitable building for the receiving, storing, delivering and handling of all grains received by the cars of said railroad company not otherwise consigned. A supplemental contract subsequently entered into by the same parties, provided that the elevator company should receive and discharge for said railroad company "all through grain at one cent a bushel." The railroad company evaded this provision in the contract by recognizing the through grain at Dubuque, that is to say, rebilled through grain to place of destination. In the allowance of damages the court went to the full limit of the prohibitive principle of the law. It was not satisfied with the reports of the railroad company for former years, showing the amount of grain then brought to Dubuque. The testimony of an expert, however, showing the annual per centum of increase in the amount of grain; and the testimony of other witnesses to establish the extent of the country tributary to the defendant's road; the increase of tillable land, population, etc., therein, was held to be competent as tending to fix the amount of "through grain" carried by defendant. This case has been criticized by good authority and yet the element of the law which must have been in the minds of the judges who decided that case, seems to us to be amply sufficient to support the decision. In order to be a warning and prohibit such wilful wrongs, the court took into consideration every element which might reasonably have had a bearing upon the measure of damages and considered only the existing conditions on the day of the breach to determine the amount of damages to be paid for the unexpired term of the contract. This was the aid to the remedy because of the wilful wrong.

The criticism made of this policy is that there are too many elements of uncertainty about such measures. Other railroads were likely to be built during the life of the contract into the same section of country traversed by the Dubuque & Sioux City Railroad Company etc., and thus cut off the volume of business which the Dubuque & Sioux City Railroad Company might otherwise have done. It is true that there were

elements of uncertainty in the above rules, applied in the above case, which would have been fatal in a case where a breach of a contract had none of the elements of wilfulness or wanton neglect in the breach, yet, in view of the wilfulness of the breach, in the above case, which was a fraudulent evasion of the contract, it was right that the railroad company be held to the conditions on the day of the breach. The uncertainty which the future might or might not contain, the railroad was compelled to undergo, for the confusion or uncertainty was brought in as an element by its wilful breach of the contract. There is nothing wrong in such an award of damages. The law aided the remedy and concluded the utmost and thus applied the element of the law which is intended to prohibit what is wrong.

The above case was one wherein the principle in the case of Armory v. Delamirie, one of Smith's Leading Cases, vol. 1, part 1, p. 679, was applied with full force, although it is not mentioned in the report. That case was as follows: A chimney sweep's boy (the plaintiff) found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who, under a pretence of weighing it, took out the stones, and calling to the master to let him know it came to three half-pence, the master offered the boy the money, who refused to take it and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones, and in an action in trover against the master these points were ruled: 1. The finder of a jewel though he does not by such finding acquire an absolute property or ownership, yet has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover. 2. That an action will lay against the master who gives credit to his apprentice, and is answerable for his neglect. 3. As to the value of the jewels, several of the trade were examined to prove what a jewel of the finest water that would fit the socket should be worth; and the chief justice directed the jury that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him and make the value of the best jewel the measure of damage.

Thus, also, in the case of Masterton v. The City of Brooklyn, 7 Hill (N. Y.), 61, which is a leading case, it was argued "in the case of a contract to furnish marble running through a period of five years, of which only one year had expired at the time of the breach, the benefits which the contractor might have realized must be speculative and conjectural. The court and jury have no certain data upon which to make the estimate." The court, however, held: "When a contract is broken before the arrival of the time for its full performance and the opposite party elects to consider it in that light, the market price on the day of the breach, is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the fixed time for full performance." This case fully sustains the opinion of the Iowa Supreme Court in the case of Richmond v. D. & S. C. Ry. Co., *supra*.

This principle may be applied in every kind of a case where the uncertainty of the amount of damages which might be recovered is brought about by the wrongful act of the party committing the wrong, where it is reasonable to suppose damages have resulted. The damages in this class of cases are apparently given as compensatory, yet at the same time there is an element of punitive damages without so being classed. A case in point would be one where a refrigerator car line should bring its cars some distance from the icing point to a place where peaches or other perishable fruits were being shipped and undertake to carry such fruit when the ice boxes contained half the amount of their capacity of ice. Their undertaking being one which required the highest degree of care and good refrigeration requiring the boxes to be kept full of ice, ice should have been kept on hand at the shipping station so as to have kept the boxes full of ice during the loading of the fruit. The neglect to do this and having the boxes only half full of ice during the loading into the cars of the fruit received in good condition, and thereafter, the car being shipped and arriving on a market in bad shape, every presumption would be taken in favor of the shipper and against the company and the highest prices on that market on the day of

arrival would be the measure of damages, and this, even though the car was received a few hours from time of shipment and arrived on the market with the boxes well filled.

The presumption *contra spoiliatorem* also arises, when a party to a suit or controversy wilfully destroys or suppresses, by wrongful or dishonest means, a deed, will or other instrument, which belongs to or would be admissible, if called for or produced by the opposite party, and will justify a court or a jury in drawing the most unfavorable inference consistent with reason or probability, as to the nature and effect which they have thus been precluded from examining and using as a means for the discovery of the truth. Askey v. Odenheimer, 1 Bald. 380; Jones v. Murphy, 8 W. & S. 275, 301; Betts v. Jackson, 6 Wend. 173; Thompson v. Thompson, 9 Ind. 323; Hanson v. Eustace, 2 How. 653, 709, 2 Am. Lead. Case, 509, 513, 5th Ed.; McReynolds v. McCord, 6 Watts, 288. It being obviously just that a loss resulting from a tort should fall on the wrongdoer and not on the person whom he has injured. And the same presumption will be made if the destruction was wrongful only and not fraudulent. Downing v. Plate, 90 Ill. 268. See note to Armory v. Delamirie, Hare & Wallace, Am. Ed. 679, 687.

NOTES OF IMPORTANT DECISIONS.

TELEPHONE SERVICE—CONTRACT AS TO RATES TO CITIZENS WHERE CITY GRANTS FRANCHISE IN CONSIDERATION THEREOF. — The case of Wright v. Glen Telephone Co., 95 N. Y. Supp. 101, recently decided by the Supreme Court of New York, contains a point of general interest with regard to telephone service, where a franchise has been granted a company based upon a reasonable consideration to serve citizens of the city or town granting the franchise. A citizen brought the suit in question, his complaint, (which was demurred to) fairly showing that in the year 1900 the cities of Gloversville and Johnstown were receiving telephone service from the Hudson River Telephone Company, and the defendant presented to the common council of the city of Gloversville a petition, signed at its request by the plaintiff and many other citizens, embodying its proposed terms of service, and asking that the franchise the defendant sought be granted. The defendant also presented the franchise it desired and a petition requesting that it be adopted, which was done, and the defendant duly accepted said franchise and agreed to its terms. By it, among other things, the defendant had the right to erect its poles and string its wires over the public streets, highways, alleys, and public places, and in consideration thereof was to pay the city $500, grant to it four free telephones, and furnish to the citizens, office service at $2 per month and residence service at $1 per month; the party served to furnish his own telephone. The plaintiff, in writing, requested service in his office, agreed to pay the $2 per month, the rental to commence when 200 telephones were in use in each of the two cities, and the defendant furnished him the service, and he discontinued his service with the rival company. By reason of the competition between the two companies, the Hudson River Company discontinued its telephone service in said cities in the year 1904, and got control of the defendant company and its business, and manages that company. The defendant now refuses to serve plaintiff's office unless he will sign a contract agreeing to pay $3.50 per month, and use its telephone, refusing to sell him a telephone, and refusing to grant him service upon his telephone or to serve him for $2 per month. The $2 rate was a fair and reasonable rate; the $3.50 rate an excessive and unreasonable rate. The telephone furnished by the plaintiff is the same kind as previously used in his office and now in use by the defendant in other offices, and a proper instrument. Service is furnished other professional and business men, where similar or greater service is required, upon better terms, and the plaintiff and his profession are unjustly discriminated against; and plaintiff asks that the defendant, by order of the court, be required to furnish him the service at $2 per month. The court said:

"It is true, as contended by the defendant, that it gets its right to pass over the public streets and highways, not from the city, but by virtue of the transportation law. Section 102, ch. 566, p. 1198, Laws 1890. But this so-called 'franchise' from the city gives the defendant valuable rights not secured to it by the transportation law. That law gives the defendant no rights in the public parks or upon the public property or public places of the city outside of the highways. Neither does that law deprive the city of its police power, under which it may determine how the lines are to run—whether upon poles, or in subways or conduits—and many other things relating to the transaction of the business. By engaging in this public utility, the defendant becomes subject to certain rights of, and restraints by, the municipalities through which it operates. City of Rochester v. Bell Telephone Co., 52 App. Div. 6, 64 N. Y. Supp. 804; American Rapid Telephone Co. v. Hess, 125 N. Y. 641, 26 N. E. Rep. 919, 13 L. R. A. 454, 21 Am. St. Rep. 764. There is, therefore, sufficient consideration between the defendant and the city, and the contract is binding between them. While the defendant is operating its lines pursuant to that so-called 'franchise,' and getting the full benefit of its contract

with the city, and occupying its public places, it is not in a good position to urge in a court of equity that it cannot be required to perform its part of the agreement.

The defendant relies upon Embler v. Hartford Steam Boiler Insurance Co., 158 N. Y. 431, 53 N. E. Rep. 212, 44 L. R. A. 512, and the principles there discussed, claiming that the city owed no duty to its citizens to obtain cheap telephone rates for them; that the plaintiff is not a party to, or in privity with, the parties to the contract, and therefore cannot maintain this action. In that case the employer obtained the policy insuring against accidents; the defendant agreeing to pay for the loss of life or injury to the assured, or any person in his employ, not to exceed $5,000 for each person killed or injured, the payment to be for the benefit of such person or his representative. The representative of the deceased employee brought an action against the company, and settled for $1,500. The estate then assigned its interest in the policy to the plaintiff, who brought the action to recover the balance of the $5,000. Judge Gray, who wrote the opinion, held that a recovery could not be had because of want of privity, and that the employer was under no duty to insure the employee, and that for that reason the action could not be maintained; but the majority of the court concur in the result, putting their decision upon the ground that at the most the policy was one of indemnity only, and, the estate having settled for $1,500, there could be no further recovery on account of that death. It is but fair to infer from the memorandum of the majority of court that if there had been no settlement plaintiff could recover. This case shows that the doctrine in the former cases is not at least to be extended any further, and emphasizes the suggestion that the right of a third person to recover upon a contract made by other parties for his benefit must rest upon the peculiar circumstances of each case, rather than upon the law of some other case. The public parks and public places of a city are for the pleasure and satisfaction of the citizens, and they have rights in those places; and when a city grants to a telephone company the right to erect its poles and string its wires in those places, interfering more or less with the use of the same by the citizens, it is not only its right but its duty to require that the citizens shall all be treated alike in the service to be rendered, and that they shall receive service at the same reasonable rates that is furnished in rival cities. In lieu of requiring a large compensation paid to itself for these rights, at the request of the company, it may require a nominal sum, and safeguard the rights of its citizens in such respects as it deems necessary and proper. But here the plaintiff's rights rest not only upon these considerations, but at the defendant's request he signed the petition to the common council, embodying the terms of service, and requesting that the contract be made and the franchise granted, and upon that petition the so-called "franchise" was granted by the city, and the defendant in writing accepted and agreed to its terms. These four papers should be read together. Afterwards the plaintiff requested service, agreeing to pay the $2 per month. The defendant accepted his request, and furnished the service. This request for service and the furnishing of the service must refer back and relate to these public documents. The plaintiff, therefore, became a party to the contract and its consideration—connected it in the making of it—and upon his request, as well as that of the defendant, the contract was made. It was made for his benefit, as well as the benefit of the defendant and the municipality itself.

I therefore hold that the contract between the defendant and the city is valid, and that plaintiff may insist that the defendant comply with its terms and conditions so far as he is concerned. Most of the cases cited by the defendant where a third person has not been able to recover upon a contract made between others are actions of law, and are governed by the strict rules of law. In this action for an injunction a court of equity is not controlled by such rules, but is principally concerned in knowing whether the defendant owes a duty to the plaintiff, and is violating that duty, and, if so, it has the power to grant such relief as is proper. But the plaintiff is not necessarily proceeding for the enforcement of the contract. The defendant, by this so-called 'franchise,' admitted in the most public manner that $2 per month was an ample compensation for office service, and that it was reasonable and proper that the party receiving the service should furnish his own telephone. It has been furnishing offices at $2 per month, and if that rate was reasonable when it was building up its business against a competitor, it is equally reasonable after it has crushed out the competitor, and compelled it to make terms with it. The $3.50 is alleged and admitted to be an excessive rate, and is more than the defendant has agreed to furnish similar service to the city for, and to all offices in the city, and it discriminates against the plaintiff in favor of offices in which other business is transacted, and where the service is the same or less than in plaintiff's office. A court of equity has power to compel a public service corporation to furnish all citizens alike with its service at a reasonable and just price and at uniform rates, and to prevent discrimination. The defendant has a certain right to carry on its business in its own way where it does not prejudice the rights of others, and if it is more desirable for it to use its own telephone in place of the telephone of a customer, it should have this right for its own accommodation, but should not charge the customer therefor. Therefore in this case the judgment should provide that if the defendant desires, it may use its own proper telephone, but shall not charge for the use thereof, and shall render the service at $2 per month."

Such service as public servants are bound to furnish under the common law courts will compel it by *mandamus*. State v. Webster & Nebraska Telephone Co., 17 Neb. 136, 52 Am. Rep. 404; State v. Republican Valley R. Co., 17 Neb. 656, 52 Am. Rep. 424; State v. Joplin Water Works, 52 Mo. App. 312; Chesapeake & P. Telephone Co. v. Baltimore & O. Telegraph Co., 66 Md. 400, 59 Am. Rep. 167; Central Union Telephone Co. v. State, 118 Ind. 194; C. & N. W. Ry. Co. v. People, 56 Ill. 367, 8 Am. Rep. 90; State Postal Telegraph Cable Co. v. Del. & A. Co. Telegraph & Telephone Co., 47 Fed. Rep. 633; Augusta So. R. Co. v. Wrightsville & T. R. Co., 74 Fed. Rep. 527; People v. C. & A. R. Co., 130 Ill. 181; Wheeler v. N. Col. Irg. Co., 10 Colo. 582; Hangen v. Albma Light & Water Co., 21 Oreg. 423, 14 L. R. A. 424. See a full discussion of this subject Vol. 45 CENTRAL LAW JOURNAL, 278. It would seem that a proceeding in equity, such as that of the principal case, should be more efficient than a proceeding in *mandamus* in many cases.

EQUITY—EFFECT OF A FAILURE TO OBJECT TO A TRIAL BY JURY IN A SUIT IN EQUITY. —In the case of McClelland v. Bullis, decided by the Supreme Court of Colorado recently, and reported in 81 Pac. Rep. 771, an interesting question is discussed and properly decided.

It would be interesting, however, if the facts were brought to light, to see how many equity cases were tried in code states and settled as common law cases, without the slightest knowledge on the part of either of the parties or the court, that the case was one in equity.

The statement of the facts, in this case, would take up so much space that we can only show the principles involved in the question under consideration. The plaintiff in error, among others, relied for reversal upon the following propositions: First, the court erred in disregarding the verdict of the jury, and in making findings and entering a decree contrary thereto; second, the court erred in immediately making findings upon all the issues in the case directly contrary to the verdict of the jury and in entering a decree thereon, without granting the plaintiffs in error a further opportunity to be heard as on a trial by the court. The court took the propositions together, as to whether or not the court erred in disregarding the verdict and entering a decree contrary thereto, without granting the plaintiffs an opportunity to be heard as on a trial by the court. This action was entirely equitable in its nature. It has none of the elements of an action at law. In such cases the verdict of the jury is merely advisory. The court held that it was proper to disregard such a verdict and decide the issues for itself on the evidence produced, citing Porter v. Grady, 21 Colo. 74, 39 Pac. Rep. 1091; Peck v. Farnham, 24 Colo. 141, 49 Pac. Rep. 364; Wilson v. Ward, 26 Colo. and several other Colorado opinions. Much of the argument of the plaintiffs in error was devoted to the proposition that defendant in error (plaintiff below), having elected to treat the action as one at law, instead of one at equity, cannot now be heard to assert that it was equitable, instead of legal, and that he is absolutely bound by the verdict of the jury. There is nothing in the record from which it appears that defendant in error at any time treated the action as one at law, except the fact that a jury was called to try the issues without objection on his part, and the fact that the jury was sworn generally to try the issues and render a general verdict. An objection to the calling of the jury might not have been availing, because it is within the power of the court to call a jury to try any issue of fact, either legal or equitable, and to submit to such jury all questions of fact arising from the case. The facts stated in the petition and the relief asked constitute a case in equity, and it is well settled that in such cases the verdict is merely advisory, and may be disregarded by the court. Coglan v. Beard, 67 Cal. 303, 7 Pac. Rep. 738; Wallace v. Maples, 79 Cal. 433, 21 Pac. Rep. 860; Adickes v. Lowry, 12 S. Car. 97.

The court said: "While we have examined the authorities presented by plaintiffs in error, we shall not attempt to review all of them, because it is well settled in this state that the verdicts of juries in such cases are purely advisory. Suffice it to say that practically all of the cases cited by plaintiffs in error recognize the right of the court to set aside the verdict. For instance, Ross v. New England Ins. Co., 120 Mass. 117, recognizes the right of the court to set aside the verdict. So in Franklin v. Greene, 2 Allen, 519. In *Ex parte* Morgan, 2 Ch. D. 72, it is said by James, L. J.: 'I take the rule in chancery and bankruptcy, with respect to verdicts of juries, to have been substantially the same as in the common-law courts, namely, that the finding must be considered as *res judicata*—conclusive between the parties—unless and until it is set aside. But in chancery and in bankruptcy the court has also substantially the same powers as the courts of common law had to pronounce a judgment *non obstante veredicto*. If, assuming the finding of the jury to be correct, that the fact or facts is or are as found by them, there are other facts or other considerations which enable the court to pass over that finding, and to pronounce a decree or make an order adverse to the party who has obtained the verdict, the court is entitled to pronounce such decree or make such order.' In Setzer v. Beale, 19 W. Va. 274, it is said: 'After a verdict is rendered by a jury on an issue out of chancery, if, upon the proofs as they stood at the hearing, an issue ought not to have been ordered, it is the duty of the chancellor, notwithstanding the verdict, to set aside the order directing the issue, and enter a decree on the merits as disclosed by the proofs on the hearing when the issue was ordered.' In Ivy v. Clawson, 14 S. Car.

272, the first exception of appellant was 'that the verdict of the jury should have been regarded as conclusive of the issue referred.' The appellate court said: 'The judge, sitting as chancellor, is not required to regard the finding of the jury as conclusive of the fact submitted, any more than he would the report of a referee, but, on the contrary, is bound to consider all the evidence in the whole case, including the finding and the evidence to support it, and pronounce his judgment accordingly.' In the states where equity and common law cases are tried separately, cases are referred to a master in chancery to take the evidence and report the findings to the court, yet at the same time the court may allow the parties a jury to try the facts, but neither in the case of the findings by the master, nor those of a jury is the chancellor bound. He may make his own findings notwithstanding the master or jury and enter a decree directly contrary to the conclusions of either."

THE DOCTRINES OF ASSUMED RISK AND CONTRIBUTORY NEGLIGENCE AS DEFENSES TO ACTIONS FOR DAMAGE RESULTING FROM A FAILURE TO COMPLY WITH EXPRESS STATUTORY PROVISIONS.

In a number of states statutes have been enacted, commonly known as "Factory Acts." These statutes are more or less alike, and were adopted by the several legislatures largely for the purpose of providing means for protecting the liberty, safety and health of laborers employed in factories whose duties are to work with and around the machinery or instrumentalities referred to in the act. The usual provisions are as follows: "Every person owning or operating any manufacturing eatablishment in which machinery is used shall furnish and supply for use therein belt-shifters or other safe mechanical devices for the purpose of throwing on or off belts, and wherever it is practicable machinery shall be operated with loose pulleys. All vats, pans, saws, planers, cog-geering, belting, shafting, set-screws, and machinery of every description used in a manufacturing establishment, shall, where practicable, be properly and safely guarded, for the purpose of preventing or avoiding the death of or injury to the persons employed or laboring in any such establishment, and it is hereby made the duty of all persons owning or operating manufacturing establishments to provide and keep the same furnished with safeguards, as herein specified." In some states it is further provided that a failure to comply with these provisions on the part of the owner or operator of a factory shall constitute a public offense, and specific penalties are prescribed, and in a number of them it is specially declared that a continuance in the service on the part of employees, after knowledge of a non-compliance with the law on the part of the master, shall not be deemed to be an assumption of risk of danger therefrom.

From an examination of the decisions on this subject of the law it will appear that there is an utter lack of uniformity of conclusion amongst the courts which have construed these statutes with respect to what defenses are available in actions for damages resulting from a failure to comply with these statutory requirements, and this confusion or discord is not due so much to a difference in the language or wording of the statutes as to an actual disagreement amongst the several courts of the effect and meaning of them, and although the doctrine of assumed risk is by no means new, it is nevertheless a fact that nothing is more unsettled by judicial authority than the question of the right to set up the doctrine of assumed risk as a defense to actions for damages resulting from a failure to comply with these laws. There are decisions to the effect that even if a statutory requirement has been expressly ignored by an employer, a servant injured by reason thereof cannot recover against the master because he is held to have assumed the risk under the maxim of "*volenti non fit injuria*." Other courts have denied this but hold that although the servant cannot be said to have assumed the risk he still cannot recover against the master because of his own contributory negligence; that though he did not assume the risk he is still guilty of contributory negligence, because he undertook to do a piece of work fraught with danger. Still other courts have gone so far as to shut out both doctrines of assumed risk and contributory negligence as defenses to actions for injuries occasioned by a non-observance of these laws and, finally, there are decisions which, I think, correctly hold that the so-called doctrine of assumed risk cannot be urged as a defense in actions for injuries resulting to employees by reason of a disregard by the master of statu-

tory obligations, but that contributory negligence may be urged as a defense, providing it actually exists. Of course under statutes which expressly provide that continued service on the part of the employee, after knowledge of the non-compliance with the law, shall not constitute an assumption of risk, all the courts agree that the defense cannot be urged, but here is where the evil of failing to make the proper distinction between assumption of risk and contributory negligence becomes the most potent, but of this later.

In my opinion there ought not to be any distinction between the statutes which provide for a penalty for a non-compliance with them, or which expressly negative the right to set up the defense of assumed risk in actions for their breach, and those containing no such provisions, with respect to the rights of the parties in civil damage suits, and in this article I will discuss the subject as though neither provision existed anywhere. Assumption of risk is a term of the contract. It exists either expressly or by implication, and the one is no more effective or binding than the other. The very name of the term indicates that it is contractual in its nature. There can be no such a thing as assumption of risk or assumption of anything else except in connection with a contract. When a servant is employed to perform certain work, providing the work to be performed be lawful, whether anything is said on the subject or not, the law reads into the contract, by implication, that he (the servant) shall assume all the ordinary risks incident to the service, and also all the extraordinary risks which are known to him, and from this of course flows the well known rule, that in case an injury occurs to the servant from one of these incidental dangers assumed by him in his contract he cannot recover from the master therefor, and these conditions and relations are in no manner modified or changed by the statutes under consideration. But the same rule of law by which the servant is held to have assumed all the ordinary risks which are incident to the employment, and those extraordinary risks which are known to him, by implication, because of his contract with the master, absolves the servant from assuming dangers which in contemplation of law have no existence, namely, dangers existing because of the master's failure to carry out a positive mandate of the law, which in his contract with the servant he impliedly agreed to do. In contemplation of law the parties could not, at the time of the making of the contract,—when the servant must have done his assuming, if at all,—have taken into consideration dangers from a non-observance of the statute, and therefore the servant cannot be said to have assumed them as an incident to the service. This would not be binding if actually made by special agreement. How can it then be supposed that such an agreement could exist by implication of law? It would be paradoxical for the law to imply an agreement or to impose a duty which has no existence except that the law be broken. The logic of this is that it is lawful to break the law. What then is unlawful? It is said, however, in some of the cases to which I shall refer, that this argument could be made with equal cogency to a non-compliance on the part of the master of his common law duty, to furnish a reasonably safe place to work to the servant, and it is said that it is everywhere conceded that the servant assumes the risk of the master's dereliction in this respect; and that a breach of a common law duty is just as wrong as a violation of a statute, whose object is to mould a common law duty into concrete form. There is some force in this line of reasoning, but I think that a great many courts have gone entirely too far on the question of assumed risk. Be this however as it may, there is a vast difference between the general undefined common law duty to furnish a reasonably safe place or instrumentalities to the servants, and a positive statute, declaring what shall be safe and demanding what shall be done. As is said by the Supreme Court of Indiana in the case of Monteith v. Enameling Co.[1] "And here a distinction is to be noted between statutes such as the employer's liability acts, which provide in general terms that the employer shall be liable for injuries to an employee where the injury is occasioned by reason of defects in the condition of ways, works, plant, tools, machinery, etc., and statutes which require of the employer the performance of a specific duty, such as to guard or fence dangerous machinery. Statutes of the former class do little more than declare the rule of the common law. Stat-

[1] 58 L. R. A. 944.

utes of the latter class impose specific obligations. A failure to comply with the requirements of the first may or may not be negligence. A violation of the second is an unlawful act or omission, a plain breach of a particular duty owing to the servant, and generally is negligence *per se*."[2]

As said before, when the master and the servant make an agreement by which the one agrees to employ and the other agrees to serve, the law reads into their contract lawful reciprocal duties and obligations. It says for the servant: I will assume all the ordinary risks which are incident to my service, and also all the extraordinary risks which may become known to me during the continuance of my employment. It says on behalf of the master: I will equip my plant in which you are to work, and the machinery and instrumentalities contained therein, in the exact manner as is prescribed by law, and I will keep the same in that condition not only while your service lasts, and for the purpose of protecting you, but for all time, and for the purpose of protecting all people who may come in contact with them, and while my plant is not now equipped in statutory shape, you need not take that into consideration in entering into your contract with me, because I must and will make the necessary alterations and repairs, and until I make these alterations and repairs I will be responsible to you in damages if any injury results to you because of my failure to comply with the law. These, by law, implied mutual duties and obligations, exist as well where the parties stipulate otherwise, as where nothing is said on the subject. The law will not sanction an agreement which has for its object a breach of its commands, as is well said by Judge Baker, of the Supreme Court of Indiana, in the case of Davis Coal Co. v. Polland.[3]

"Freedom of contract should not be lightly interfered with. As a general rule, the right of contracting, as one sees fit, stands untrammeled. But the state has power to restrict this right in the interest of public health, morals and the like. When, in the present case, it is pointed out that the legislature has failed in terms to deny the employee's right to assume the risk from his employer's disregard of the statute, the question is not ended. If the legislature has clearly expressed the public policy of the state on a matter within its right to speak upon authoritatively, and if that public policy would be subverted by allowing the employee to waive, in advance, his statutory protection, the contract is void as unmistakably as if the statute, in direct terms, forbade the making of it."

Under these statutes, therefore, the rights of the parties, with respect to the doctrine of assumed risk, are the same as where no such statute exists and where the servant, before receiving his injury, complains to the master that the machine or appliance with which he is working is defective and out of repair, and which the master agrees to remedy. The statute operates as a continuing complaint of defects, and it also operates as a continuing promise to make repairs, and it is universally conceded by all the courts that where there is complaint of defects by the servant, and a promise to repair them by the master, that under such circumstances the master assumes the risk pending the making of repairs.

From the notice to the master of the defect, and the promise by the master to repair them, is properly implied, the agreement of the master that he will assume the risk of injury pending the making of repair.[4]

The very decisions which hold that continued service by a servant with knowledge that the master has failed and intends to fail to comply with the law, amounts to an assumption of the danger, superinduced by such failure, on the part of the servant, all make the qualification, that where there is complaint by the servant, and a promise to remedy by the master, that then the master and not the servant assumes the risk pending the making of repairs.[5] Now why this general qualification, unless it be a recognition of the doctrine that under certain circumstances the law will cast the burden of the risk from a defect, upon the master, by implication, and that this takes place by reason of and because of the notice and promise above referred to? If this be so, and it cannot be otherwise, then the rest is easy, because no lawyer will claim that a simple promise to a complaining servant to make repairs is any more binding upon the master, or any

[2] See cases cited in opinion.
[3] 158 Ind. 616.
[4] Gardner v. Mich. Cen. Ry. Co., 150 U. S. 349.
[5] St. Louis Cordage Co. v. Miller, 126 Fed. Rep. 495.

stronger in its effect, than the positive command of the statute.

The logic of the entire argument is that "assumed risk" rests really upon the contract, and in most instances by implication of law. Either one or the other assumes it under and because of the contract. In those instances where it is cast upon the master, it is because of the master's implied contract to assume it until he makes the promised repairs. Under the statute the law makes this promise for the master, and then implies the agreement on his part to assume the risk of defects until the statute is complied with. The casting of the burden on the master is by no means in the nature of a penalty. but it is there as a part of his contract, and it is just as binding as the master's agreement to pay the servant his wages. This it seems to me is practically all there is to the question.

From the foregoing it must not be understood that it is meant that the master shall literally assume the risk, because in order to do this he, and not the servant, should expose his person to the danger. The only way in which the servant can escape danger to his person is to keep away from the danger. In this respect, it is true, that the servant remaining at work after knowiedge of the danger, voluntarily assumes the risk, but all that is meant by the statement that the master assumes the risk is, that the master agrees to be responsible in damages to the servant in the event he sustains an injury.

The case of Hall v. West Slade Milling Co.,[6] is probably the latest decision on this subject. The majority of the court follow the case of Narramore v. Cleveland, C. C. & St. Louis Ry. Co.,[7] in which Judge Taft writes the opinion. This is so ably done that the case is referred to by the Washington court, as a leading case against the right to set up the defense of assumed risk in damage suits for a violation of an express statute. This opinion should be read and studied by every lawyer.

In the Washington case above referred to there is a long dissenting opinion by Judge Root, concurred in by two of his associates. This dissenting opinion contains practically every argument which is ever made in favor of the right to set up the defense, and many cases are cited in support of the judge's argument.

The statute under consideration in that case is practically the same as that quoted herein (which is the Kansas statute), except that in Washington a penalty is prescribed for its violation. After quoting the statute the dissenting Root says this:

"Having read the statute let us ask some questions as to its contents? Does it say that assumed risk shall not be permitted as a defense, where a violator of the statute is sued by a servant injured by reason of such violation? No. Does it say anything about defenses of any kind? No. Does it say anything about assumed risk? Does it directly or indirectly say anything about actions for personal injuries? No. Does it say that the penalty therein provided may be augmented by depriving the defendant in a damage case, of the defense of assumed risk? Nothing of the kind. Does it say anything about civil liabilities or actions? Nothing. It is a criminal statute. Its provisions are clear and easily understood."

Later on he says: "If the legislature had intended this statute to cut off the defense of assumed risk, it could easily have placed therein language to evidence that intent. It did not do so. It gave no expression whatever of any such purpose. How this court can find that the legislature by this statute, intended to defeat this defense, when the statute contains not a word indicating such intention, is a query to which I have received no satisfactory answer. Congress in enacting a law requiring certain classes of railroad companies to use automatic car couplers, expressly provided that the servant should not be deemed to have assumed the risk where the master violated said statute. To cut off this defense congress evidently deemed it necessary to expressly enact a provision to accomplish said result."

Now I do not pretend to be advised as to just what induced congress to add this provision, but I think its object was to guard against a judicial repeal of the law. It evidently intended to be on the safe side, like the man who received a telegram announcing the death of his mother-in-law, and requesting instructions whether the remains should be cremated or buried, who hurriedly sent

[6] A Washington case reported in 81 Pac. Rep. 915.
[7] 96 Fed. Rep. 298, 37 C. C. A. 499, 48 L. R. A. 68.

back this reply: "Do both — take no chances."

As already observed I do not believe that this provision in the act of congress, and several state statutes, adds anything. If the statute without such provision does not cut off this defense, then congress or any state legislature has no right to cut it off. In other words, if under the statute it were lawful for a servant to assume the risk under and as a part of his contract, then the provision in the act of congress, and in the laws of several states, would be void as an unauthorized interference with the making of lawful contracts. If assumption of risk were a penalty imposed on either master or servant, then, erhaps, the legislature would have the right to place it where it saw fit, but it is not a penalty. It is a part of the contract.

But here again Judge Root dissents. He says: "To show that the assumption of risk is not merely a matter of contract let us use the following illustration: A servant agrees to work for five years at a given compensation in a mill, where he knows that the machinery is not guarded. After working there a year the legislature enacts a statute requiring the machinery to be guarded, and expressly cutting off the defense of assumption of risk and the right to plead the same. The master ignores the statute and the servant is injured by reason of said neglect. He sues. The master pleads assumed risk. The servant sets up the statute. The master says the statute is unconstitutional because it impairs the obligation of the contract with the servant wherein the latter impliedly agreed to assume the risk. This defense would be absolutely good if the assumption of risk were merely a matter of contract." Surely this is a new one. Now let me state another illustration: Suppose it were lawful in a given state to manufacture and sell intoxicating liquor, and A enters into a contract with B, whereby he agrees to manufacture for and sell to B a given quantity of liquor, the liquor to be manufactured, delivered, and paid for in the future. Certainly the relations between A and B are contractual, and nothing more. The law imposes a duty on A to furnish the liquor at the time specified, and on B to pay for it. Now suppose that before the time for the performance of the contract arrives a prohibition aw is passed forbidding the manufacture, keeping, handling or sale of this liquor, could this contract be enforced? Certainly not, and yet it impairs the contract existing between the parties.

Finally the judge in his dissenting opinion enters upon a general discussion of the subject, and indulges in rather severe criticism of the majority opinion and the cases which it follows, and then says:

"Every decision such as the respondent now asks for is a barrier to investments. Capital is timid, and few things are better calculated to frighten it than uncertainties in the law and partiality and innovations in the manner of its administration by the courts."

Can it be possible that this timid capital is less afraid of the criminal end of the law than of civil damage suits? It can certainly protect itself of these suits by simply complying with the law. Or is it to be believed that timid capital should be permitted to violate the law without being liable either civilly or criminally?

There are many other things said in the dissenting opinion to which no reference has been made, and indeed some of the reasons and arguments are not without merit. The opinion is quite lengthy and I believe it contains everything which can be said in favor of the other side of the proposition under consideration. Many cases are cited as supporting it, and a great many of them actually do support it. It may be said that the largest number of cases on this proposition, are contrary to my contention. Some of them however are contributory negligence cases, and the courts did not make the proper distinction between the two terms. All these things are discussed with clearness in the case of Narramore v. Railway Co., above referred to, and it is not for me to add anything to what so distinguished a judge as Taft has said, and in discussing the other question, the right to plead and prove contributory negligence in actions founded upon a statutory violation, I can do no better than to quote from his opinion. He says: "That under certain circumstances the defenses of assumed risk and contributory negligence come very near to each other and cannot easily be distinguished, may be conceded, but in most cases there is a broad line of distinction, and it is so in this case. For years employees worked in railroad yards in which blocks were not used, and yet no

one would charge them with negligence in so doing. The switches and rails were mere perils of the employment. Assumption of risk is in such cases the acquiescence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract. Contributory negligence in such cases is that action or non-action in disregard of personal safety by one who treating the known danger as a condition, acts with respect to it without due care of its consequences. Acquiescence with knowledge is not synonymous with contributory negligence. One having full knowledge of defects in machinery with which he is employed may use the utmost care to avert the dangers which they threaten, and yet not escape unhurt."

In Davis Coal Co. v. Polland, already referred to, this is said: "Counsel are confusing the doctrines of contributory negligence and assumption of risk. Assumption of risk is a matter of contract. Contributory negligence is a question of conduct. If appellee were to be defeated by the rule of assumed risk, it would be because he agreed long before the accident happened, that he would assume the very risk from which his injury arose. If appellee were to be defeated because of his contributory negligence, it would be because his conduct, at the time of the accident and under all the attendant circumstances, fell short of ordinary care. If the one circumstance of the employee's knowledge of the employer's failure to provide the statutory safe-guards were held, as a matter of law, always to overcome the other circumstances characterizing the employee's conduct at the time of the accident, assumption of risk would be successfully masquerading in the guise of contributory negligence." In cases where it is permissible to make both defenses the distinction between them is probably unimportant. In those cases courts often refer to them indiscriminately and, I believe, from this defective terminology made use of under such circumstances, results the partial obliteration of the proper distinction between the two, and there are a great many such cases. For instance, in the case of Miller v. St. Louis Cordage Co.,[8] in the dissenting opinion this is said: "I do not regard the question whether contributory negligence and assumption of risk considered as defenses to an action for personal injuries, are identical or are different defenses, as of much practical importance. That is rather a question for the school-men. It matters very little whether we say of a servant who has used a defective tool or appliance which the master has supplied, with full knowledge of the defect and a full appreciation of the danger incident to its use, that such servant is as much at fault as the master, and is guilty of contributory negligence, or whether we say that he has agreed to assume the risk and absolve the master from liability. The result as respects the master's liability is the same in whatever way we may choose to designate the defense." Many other cases to the same effect exist, but it is not necessary to cite them. Under this line of reasoning, the delinquent master and his attorneys, when they discover that assumed risk cannot be relied upon as a defense, adroitly change their tack, and prove assumed risk under the name of contributory negligence, and thereby obtain the same results as if they were permitted to call it by its right name.

It is not my purpose to cite all the authorities, *pro* and *con*, which could be collated upon the questions which I have attempted to discuss. These are sufficiently referred to in the cases which have been mentioned—and there are many. My purpose in writing this article is to call attention to the remarkable confusion which exists, and to point out some of the reasons why the position for which I contend, and the cases upon which it is based, are law and why the other contentions and cases are not law.

In conclusion, I wish to say, that in my judgment modern lawyers rely altogether too much upon the number of cases which can be found for or against a given proposition, and satisfy themselves and the court with the statement that the weight of authority is this or that, as if the correct determination of legal principles depended on the majority of cases for or against it, and I believe that this disregard of proper legal reasoning on the part of judges and lawyers, is the primary cause of a great deal of confusion which exists.

M. C. Freerks.

Wichita, Kan.

[8] 126 Fed. Rep. 495.

DIVORCE—DUTY TO EFFECT RECONCILIATION.

EDWARDS v. EDWARDS.

Court of Chancery of New Jersey, July 3, 1905.

Where a wife, in leaving her husband, wrote to him indicating that she had taken the step, because of serious quarrels with her husband's mother, and gave him permission to come and see her, and signed herself in an affectionate manner, there was no willful desertion, and it was the husband's duty to seek his wife and urge a reconciliation.

A letter written by a wife to her husband, stating, in response to his request for information, that she intended never to live with him again, indicates a willful desertion.

MAGIE, Ch.: The master, to whom this undefended divorce case was referred, has reported that the proofs before him establish a willful desertion of petitioner by defendant on July 29, 1901. I am unable to discover sufficient evidence to support that conclusion. On July 29, 1901, the defendant left the house in which she and her husband had been living, and thereafter did not return. When she left, her husband was absent. In his testimony, he admits that his wife and he had a quarrel on the night preceding that day; but he claims that they had been reconciled. If the wife's conduct in leaving indicates an intent to desert, the case of the petitioner will be made out.

Her intent at the time is indicated in two modes: (1) By the testimony of a neighbor, who came to her house while she was preparing to leave, and to whom she stated that she was intending to leave; and (2) by a letter which defendant sat down and wrote to her husband in the presence of the neighbor. This letter is more persuasive evidence than that elicited from the person present. I find it impossible to read it and resist the conviction that its writer did not intend to break up her home and life by removing from her husband's house. In it she declares that her husband loves his mother better than he loves her, and plainly indicates that there had been a serious quarrel between them, evidently respecting some difficulty with his mother. She says, "I do not like black looks as I have been getting, and you would not do it if you did not want me to go;" and a fair inference is that in this, and perhaps in previous quarrels, his conduct was such that she assumed that he desired her to leave him. At all events, after signing herself thus, "I am as very [ever] your true and loving wive," she adds, "Now, Ed, go and have a good time, as I will stay at home; but if you want to see me, you can."

From the tone of this letter, I think it clear, under the doctrine of our cases, that it was the duty of the husband to seek and urge a reconciliation with his wife, who thus left him holding out a hope that, if he came to see her, matters might be mended. Petitioner did not perform this duty, but on the 2d of August published in the local newspaper a notice that his wife had left him, and forbidding any one to trust her on his account. On the 3d of August, defendant procured the insertion in the same newspaper, below the notice of her husband, of a paragraph stating that she had just cause for leaving him, and "if he wants the world to know the reason, I will publish it, if needed." The petitioner produces no evidence of any immediate attempt at reconciliation. He states in his deposition that he sent friends to her, but he does not disclose the names of the friends or produce them as witnesses. That evidence is wholly unavailing to establish his performance of his duty.

On the 21st of September, 1901, petitioner received a letter from a lawyer, threatening him with proceedings if he continued to "slur" his wife. Thereafter the petitioner did nothing to procure a reconciliation with his wife until a period within a year prior to the filing of his petition. He then called upon the mother of the defendant, taking with him a friend, and demanding from the mother an interview with his wife, or a reply to his request that she would live with him. This call was repeated, but during that period the defendant was away from home, engaged in the occupation of a nurse. Thereafter a letter without date, the envelope of which is postmarked November 29, 1904, was received from defendant, in which she wrote him that she had heard that he was inquiring for her and wanted to have a talk with her in regard to living together again. She excused herself for not meeting him, on account of her being compelled by her work as a nurse to leave her mother's house, where she had been making a visit and had learned of his wish. She then added: "If you should care to write, direct to Mamma. She will forward it to me, and I will answer when I write her my address." Petitioner did not avail himself of the opportunity held out by the wife. What further he did he does not disclose; but he produces a letter without date, the envelope of which is postmarked January 19, 1905, in which his wife stated that she had heard that he wished a decided answer whether she would live with him or not, and she adds, "I never intend to live with you again." This letter is proof of a desertion that is willful, but I fail to find that prior to that letter a reconciliation might not have been effected, if the husband had done his duty in seeking it. But this leaves the petitioner unsuccessful, because the desertion thus proved has not continued for the statutory period.

The result is that the report cannot be confirmed, and the petition must be dismissed.

NOTE.—*Animus Non Revertandi as an Essential Element in Securing a Decree of Divorce on the Ground of Desertion.*—Desertion undoubtedly offers more frequent occasion for the judicial separation of marital ties than any of the numerous grounds now permitted by statute to be taken advantage of by mismated couples to secure freedom from the bonds o

matrimony. We fear, however, that courts sometimes are too ready to grant a decree on this ground without insisting more strictly on the proper showing by the plaintiff that the desertion was not caused either with his consent, or by his own bad treatment or with the intent on the part of the deserter to return when conditions under which he or she were living should be improved. It seems that many trial judges, especially in default cases, take the defendant's failure to defend as a confession and admission of all the charges mentioned in the petition instead of holding the plaintiff strictly to his proof of the essential elements of his charge of desertion against the defendant.

One of the most important essentials in substantiating a charge of desertion is proof of an intention on the part of the defendant never to return. Indeed, no absence, however long, can amount to a desertion, without an *animus non revertandi*. Desertion is separation accompanied by an intention to abandon, an intention never to return. Fulton v. Fulton, 36 Miss. 517; Smith v. Smith, 3 Phila. 489, 16 Leg. Int. 356; Lynch v. Lynch, 33 Md. 328; Ruckman v. Ruckman (N. Y.), 58 How. Pr. 278. It is evident therefore that the intention to *abandon* is the criterion, and it may be gathered not only from protracted absence, but from other facts. Thus absence for the full term of years prescribed by statute is not "desertion," in the legal sense of the term. The circumstances and manner of the desertion must be shown, in order that the court may determine the intention. Ahrenfeldt v. Ahrenfeldt (N. Y.), 1 Hoff. Ch. 47; Rogers v. Rogers, 18 N. J. Eq. 445.

It is very seldom that a defendant states outright or commits herself or himself in writing to an intention never to return. There is generally added to such statements words of limitation such as "unless you reform" or "until you can support me," etc. It is evident that such statements do not show an irrevocable intention to abandon and are therefore without any force to show desertion. On the contrary, they show that one of the essentials to constitute the ground of desertion is absolutely lacking. It is therefore generally necessary for a plaintiff to show from other circumstances the intent to abandon.

One of the very first things a plaintiff must show to prove an intent to abandon on the part of the defendant is his own absence of consent. If desertion is the deliberate act of the party complained against done with the intent, on the part of such party, that the marriage should no longer exist, it follows logically that where the separation is by mutual consent, neither party can be said to have abandoned or deserted. Nor is there present the *animus non revertandi*, because since the separation began by *mutual consent* it may be ended by mutual consent, and not until the separation by mutual consent is *ended* by one of the parties expressing a desire to resume marital relations which request the other party refuses to grant, does such mutual separation become desertion on the part of either of the parties. A divorce therefore will not be granted for desertion where the separation was merely by agreement of the parties or the party complaining subsequently consented to or acquiesced in such separation. Lea v. Lea, 90 Mass. 418; Jones v. Jones, 13 Ala. 145; Van Voorhees v. Van Voorhees (Ohio), Wright, 636; Rose v. Rose, 50 Mich. 92; Droegge v. Droegge, 55 Mo. App. 481; De Meli v. De Meli (N. Y.), 67 How. Pr. 20; Fulton v. Fulton, 36 Miss. 517; Hankinson v. Hankinson, 33 N. J. Eq. 66.

While the above rule is well settled by authority, it is not always strictly applied by trial courts so that on appeal we find many reversals of trial court judgments on this ground as was the report of the master in chancery in the principal case. Thus it has been held that a husband was not entitled to a divorce from his wife who left him to engage in business in another part of the city, when he offered no proof that he made any strong effort to influence her to remain with him, but, on the contrary, seemed to be quite contented that she had gone away. Beller v. Beller, 50 Mich. 49, 14 N. W. Rep. 696; Herold v. Herold, 47 N. J. Eq. 210, 20 Atl. Rep. 375, 9 L. R. A. 696. In an action, therefore, for divorce based on the ground of desertion, evidence that does not show that the abandonment was not caused, procured, or consented to by the plaintiff is insufficient. Roberson v. Roberson (Tex.), 2 Posey (Unrep.), Cas. 451.

Plaintiff must further show that his conduct was not such as to compel his wife to leave him, for if the plaintiff's conduct was unbearable, aside from other reasons which constitute such conduct a defense, the abandonment by the defendant will be presumed to be temporary or until his conduct should improve. In that case there would not be the necessary intention to end forever the marriage relation. Cornish v. Cornish, 23 N. J. Eq. 208.

Finally, plaintiff must show that not only the separation was without his consent, but that it *continued* for the full statutory period without his consent, acquiescence or approval. This is indeed an important element often overlooked by trial courts. Indeed, even separation by consent would become desertion, as we have already observed, from the time the complaining party makes sincere overtures to terminate it and those overtures are rejected. Hankinson v. Hankinson, 33 N. J. Eq. 66.

Just how far the complaining party must go to seek a renewal of the marital relations is a subject upon which the courts are in confusion. On principle and the weight of authority the correct rule would seem to be that except in cases where the action of the deserting party is so malicious and denotes clearly an intention to forever sever all marital relations, it becomes the duty of the complaining party to seek a reconciliation in order to show not only the absence of any consent on his part, but the presence in the mind of the defendant of an *animus non revertandi*. Thus the husband will not be entitled to a divorce on the ground of desertion when it appears that the wife left him with his consent, although she misapprehended the language of the consent, if he made no effort to induce her to return. Smithson v. Smithson (D. C. 1889), 7 Mackey, 227. So also where the husband left his wife with little means of subsistence, and went to labor in another section of the country, the fact that on his return he found his wife had gone to friends, and took with her their furniture, etc., is not sufficient to entitle him to a divorce on the ground of willful desertion of the wife, without proof of a request and her refusal to return. Farrell v. Farrell (Ohio), Wright, 455. So also where a husband abandons his family for a year, there being no evidence that the wife ever regretted the separation, but, on the other hand, that she attempted to conceal herself and prevent a reconciliation, she cannot ask for a divorce on the ground of his desertion. Goldstein v. Goldstein (N. J. Ch. 1893), 26 Atl. Rep. 862. So also it has been held that where a wife deserts her husband willfully and without cause, and afterwards, realizing that she has acted hastily, would return if the way were opened to her, but the husband refrains from doing anything to induce her to return, for the purpose of making her

absence a ground of divorce, her desertion is not obstinate and will not justify a decree of divorce until it is shown that the husband by some act expressed a willingness that his wife should return. Cornish v. Cornish, 23 N. J. Eq. 208; Trail v. Trail, 32 N. J. Eq. 231; Newing v. Newing, 45 N. J. Eq. 498, 18 Atl. Rep. 166.

Of course there need be no efforts to effect a reconciliation where such efforts would be unavailing. Trail v. Trail, 32 N. J. Eq. 231. Nor is the rule stated in the preceding paragraph construed so strictly as to compel a wife, cruelly abandoned, to expend time and money in hunting up her husband and then go to the place where he has fled and tramp at his heels begging him to return. Millowitsch v. Millowitsch, 44 Ill. App. 357; Sargent v. Sargent, 36 N. J. Eq. 644. All a complaining party is required to do in order to successfully charge desertion, sufficient to authorize a divorce, is to show that the guilty party left of his own accord, against the active opposition of the complainant, if such active opposition were possible, and without reasonable cause, and that he continued to remain away without the consent or acquiescence of the complaining party; and in cases where the *animus non revertandi* is not sufficiently indicated by facts accompanying the occasion of the separation, the complaining party must further show that after the desertion he made overtures for the return of the defendant and that the defendant rejected such overtures.

JETSAM AND FLOTSAM.

CONTRACT — NONPERFORMANCE — RECOVERY OF CONSIDERATION—RESCISSION.

In Timmerman v. Stanley, decided by the Supreme Court of Georgia in August, 1905, 51 S. E. Rep. 760, the general rule was laid down that where one party asserts the right to rescind a contract for nonperformance by the other of his covenant, the party seeking rescission must restore or tender back to the other party what has been received from him, so as to restore the parties to the condition in which they were before the contract was made.

It was held, however, that this rule has no application to a case where one agrees to teach another a certain thing, and, after beginning the course of instruction, refuses to proceed further, whereupon the other party treats the contract as rescinded, and brings suit to recover the amount which he has paid under the agreement. The court said in part:

"It is contended, in the brief of counsel for the defendant in error, that there can be no recovery of the amount paid, because, in order to rescind the contract, the plaintiff must restore the status, and must tender back to the defendant what he has received from him, and that this can not be done in the present case. Civ. Code 1895, sec. 3712. This is a general rule where one party to the contract has received goods, money or other thing of value, which is capable of being returned to the other party. But in a contract like that involved in the present case, where a person agrees to teach another a certain thing, or to qualify him for a certain position, if he gives the student some instruction and then refuses to complete his contract, there would be no possible way by which such instruction as he had given could be returned or tendered back to him; nor is the other party required to estimate value for what has been done and tender such amount. He can not hold on to the amount paid, refuse to proceed with the contract, and defend against an action to recover the price paid on the ground that the plaintiff had not tendered back to him his instruction, and could not restore him to the *status quo*. He can not by his own conduct place himself in a situation where restoration is impossible, repudiate the contract and set up this situation as a defense to a suit for the amount paid. If he abandons the contract, he should not complain that the other party is willing to treat it as rescinded.—*Washington Law Journal.*

HUMOR OF THE LAW.

"Poor fellow! Isn't he cross-eyed?"

"Yes, but he's a lawyer and you know he's one of the finest cross-examiners in the state."

"What reason does he give for not paying his wife alimony?"

"He says that marriage is a lottery, and hence alimony is a gambling debt."—*Collier's Weekly.*

"It is pretty hard," said the Czar, suddenly arousing himself from a brown study.

"What does your Majesty mean?" asked the courtier.

"It's pretty hard to think of suing for peace, when you feel as if you ought to be suing for damages."—*Washington Star.*

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCORD AND SATISFACTION — Acceptance of Payment in Full.—The acceptance by a creditor of a check held to constitute an accord and satisfaction.—Kelley v. Bullock, 94 N. Y. Supp. 517.

2. ACCOUNT, ACTION ON—Evidence. — A verified account, attached as an exhibit to the petition, is properly excluded from evidence where it does not indicate the items thereof nor their nature.—Pittsburg Plate Glass Co. v. Roquemore, Tex., 88 S. W. Rep. 449.

3. ADMIRALTY—Right of Citizen to Invoke.—A citizen of the United States cannot be deprived by treaty of his constitutional right to invoke the jurisdiction of the national courts of admiralty to determine a cause within the admiralty and maritime jurisdiction, to which he is a party and which is cognizable within the United States.—The Neck, U. S. D. C., W. D. Wash., 13 Fed. Rep. 144.

4. ADOPTION—Disinheritance of Adopted Child.—In the absence of an agreement on the part of an adopting parent to leave property to his adopted child, the adoption does not support a claim beyond the statutory provisions.—Logan v. Lennix, Tex., 88 S. W. Rep. 364.

5. APPEAL AND ERROR—Amending Assignments of Error.—An assignment of errors cannot be materially amended, and the amended assignment filed, after the expiration of the year allowed by statute for taking an appeal.—Chicago Terminal Transfer R. Co. v. Walton, Ind., 74 N. E. Rep. 988.

6. APPEAL AND ERROR—Bill of Exceptions.—A bill of exceptions held sufficient, though copy of the journal entry overruling a motion for a new trial was not incorporated.—Conradt v. Lepper, Wyo., 81 Pac. Rep. 307.

7. APPEAL AND ERROR—Harmless Error.—Where the court did not submit to the jury the matter in plaintiff's petition specially excepted to by defendant, there was no error in overruling the exception. — International & G. N. R. Co. v. Glover, Tex., 88 S. W. Rep. 515.

8. APPEAL AND ERROR—Rulings on Demurrer.—On appeal it is not necessary to consider the rulings on demurrer to the complaint, where the same questions are presented by the special findings of facts and conclusions of law.—Western Indiana Coal Co. v. Brown, Ind., 74 N. E. Rep. 1027.

9. APPEAL AND ERROR—Sufficiency of Assignment of Error.—Assignments of error that the court erred in refusing to allow plaintiff to take a nonsuit, and that the court erred in giving plaintiff a nonsuit and then entering judgment against plaintiff, are too general to be considered.—Logan v. Lennix, Tex., 88 S. W. Rep. 364.

10. ATTORNEY AND CLIENT—Authority of Attorney.—A bondholder's attorney has no authority as such to waive payment of interest.—Real Estate Trust Co. v. Union Trust Co., Md., 61 Atl. Rep. 228.

11. ATTORNEY AND CLIENT—Authority of Attorney to Employ Assistant.—An attorney has authority to empower another attorney to appear for him, and the client is bound by such an appearance.—Reich v. Cochran, 94 N. Y. Supp. 404.

12. BAILMENT—Loss of Baggage.—Plaintiff, a bailee of goods belonging to her daughter, lost through defendant's negligence, held entitled to sue therefor in her own name.—Colvin v. Fargo, 94 N. Y. Supp. 377.

13. BANKRUPTCY—Adverse Claims.—An order requiring a surplus collected on certain accounts assigned by bankrupts to their trustee, notwithstanding a further assignment of such surplus to another, who took no steps to assert his claim thereto before the referee, held proper.—*In re* Wiesen Bros., U. S. D. C., E. D. Pa., 138 Fed. Rep. 164.

14. BANKRUPTCY—Jury Trial on Involuntary Petition.—Proceedings on a trial by jury of the issues joined on a petition in involuntary bankruptcy are not subject to review by appeal, but only on writ of error. — Bower v. Helzworth, U. S. C. C. of App., Eighth Circuit, 138 Fed. Rep. 28.

15. BANKRUPTCY—Liens.—A deed of trust, executed by a bankrupt to his wife more than four months prior to the filing of the bankruptcy petition, held sustainable as a valid lien to the extent of the amount secured thereby.—*In re* Porterfield, U. S. D. C., N. D. W. Va., 138 Fed. Rep. 192.

16. BANKRUPTCY—Mortgages.—A mortgagee of land in Pennsylvania, having failed to record his mortgage prior to the mortgagor's bankruptcy, held not entitled to payment in full from the proceeds of the mortgaged property against the mortgagor's general creditors.—*In re* Lukens, U. S. D. C., E. D. Pa., 138 Fed. Rep. 188.

17. BANKRUPTCY—Persons Engaged Chiefly in Farming.—An alleged bankrupt held, on the evidence, engaged chiefly in farming, and not subject to be adjudged an involuntary bankrupt.—*In re* Hoy, U. S. D. C., N. D. Iowa, 137 Fed. Rep. 175.

18. BANKRUPTCY — Voluntary Unincorporated Associations.—A voluntary unincorporated association of fire underwriters held subject to adjudication as an involuntary bankrupt under Bankr. Act July 1, 1898, ch. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423].—*In re* Seaboard Fire Underwriters, U. S. D. C., S. D. N. Y., 137 Fed. Rep. 987.

19. BANKRUPTCY—Provable Debts.—A valid guaranty executed by a bankrupt that a corporation would redeem certain of its stock at a stated time, which had not arrived at the time of the bankruptcy, may fairly be construed as a contract to buy the stock at par at such time, and the bankruptcy is such an anticipatory breach thereof that a claim for damages for such breach is a provable debt.—*In re* Pettingill & Co., U. S. D. C., D. Mass., 137 Fed. Rep. 143.

20. BANKRUPTCY—Vendee's Lien.—In the absence of any authoritative state decision of statutes governing the case, a vendee under a contract for the purchase of land, who has recorded his bond for a deed and paid the purchase money on the bankruptcy of the vendor without having conveyed, is entitled to prove his claim as one secured by an equitable lien on the land.—*In re* Peasley, U. S. D. C., N. D. N. H., 137 Fed. Rep. 190.

21. BENEFIT SOCIETIES — By-laws as to Suicide.—A by-law of a benefit association, providing that suicide of insured shall forfeit the certificate, adopted after its issue and before his death by suicide, violates no vested right of the beneficiary.—Tisch v. Protected Home Circle, Ohio, 74 N. E. Rep. 188.

22. BILLS AND NOTES—Liability of Indorser on Certificate of Deposit.—An indorser of a certificate of deposit, having used due diligence to collect the same, held entitled to sue his immediate or any remote indorser, under Burns' Ann. St. 1901, § 7518.—First Nat. Bank v. Stapf, Ind., 74 N. E. Rep. 987.

23. BRIDGES—Knowledge of Defects. — In an action against a county for personal injuries resulting from a defective bridge, the complaint held sufficient after verdict to justify inference that defendant knew, or with proper diligence might have known, of the defective condition.—Rice v. Wallowa County, Oreg., 81 Pac. Rep. 358.

24. CARRIERS—Care Required of Drunken Passenger.—Where a conductor accepts an unattended passenger who is so drunk as to be unable to look after himself, the railroad company is bound to exercise reasonable care to protect him.—Price v. St. Louis, I. M. & S. Ry. Co., Ark., 88 S. W. Rep. 575.

25. CARRIERS—Failure to Read Express Receipts.—An owner of baggage delivered to an express company for transfer held not guilty of negligence, *per se* in accepting an express receipt containing a limited liability clause without reading the same.—Colvin v. Fargo, 94 N. Y. Supp. 377.

26. CARRIERS—Injury to Caretaker of Live Stock.—A caretaker of stock, riding in a cattle car, instead of in the caboose, has the burden of showing that he was justified in riding where he did.—Lake Shore & M. S. Ry. Co. v. Teeters, Ind., 74 N. E. Rep. 1014.

27. CARRIERS—Liability for Baggage.—An initial carrier of baggage is not liable, except by special agreement, beyond its own route.—Soviero v. Wescott Express Co., 94 N. Y. Supp. 375.

28. CARRIERS—Presumption of Negligence.—Injuries to a passenger, by derailment of the car in which he was riding while passing over a switch, created a presumption of negligence on the part of the carrier.—Minahan v. Grand Trunk Ry. Co., U. S. C. C. of App., Sixth Circuit, 138 Fed. Rep. 37.

29. CHATTEL MORTGAGE—Effect of Default. — On default by a chattel mortgagor, the mortgagee becomes the absolute owner of the chattels, and entitled to immediate possession.—Hazlett v. Hamilton Storage & Warehouse Co., 94 N. Y. Supp. 580.

30. COLLISION—Obstruction of Slip by Line.—A steamship held liable for an injury to a small steamer by striking a line which the ship had stretched across a slip and had negligently failed to mark by a light, or to otherwise give warning of its presence.—The Roma, U. S. D. C., S. D. N. Y., 138 Fed. Rep. 218.

31. CONSTITUTIONAL LAW—Limitations of Actions.—Laws 1901, p. 966, ch. 354, § 30, limiting to six months the right of action against officers of a corporation for failure to file an annual report, affected only the remedy.—Davidson v. Witthaus, 94 N. Y. Supp. 428.

32. CONSTITUTIONAL LAW—Regulating Speed of Automobiles.—Laws 1903, pp. 301, 302, regulating the speed of automobiles, held a valid exercise of the state's police power, and not unconstitutional as a deprivation of liberty or property without due process of law.—Christy v. Elliott, Ill., 74 N. E. Rep. 1035.

33. CONSTITUTIONAL LAW — Smoke Ordinance. — Chicago City Ordinance March 27, 1903, § 10, prohibiting the emission of dense smoke from chimneys for more than three or six minutes in any hour of the day, held not unconstitutional for inequality. — Glucose Refining Co. v. City of Chicago, U. S. C. C., N. D. Ill., 138 Fed. Rep. 209.

34. CONSTITUTIONAL LAW—Trading Stamp Ordinance. —A so-called trading stamp ordinance, imposing an annual license tax of $200 on persons selling goods by means of trading stamps sold to merchants for delivery to their customers, held unconstitutional and void.—*Ex parte* Hutchinson, U. S. C. C., D. Oreg., 137 Fed. Rep. 950.

35. CONTRACTS—Failure to Perform.—It was no excuse for nonperformance of a guaranty as to heating plant installed that the house, by reason of its construction, was a difficult one to heat.—White v. Von Waffenstein, 94 N. Y. Supp. 257.

36. CONTRACTS — Misrepresentations Inducing. — Defendants held not entitled to defend an action for breach of a waterworks contract on the ground that they were induced to enter into it by fraud.—Smith & Benham v. Curran & Hussey, U. S. C. C., W. D. Pa., 138 Fed. Rep. 150.

37. CONTRACTS—Public Policy.—An agreement to procure the consent of property owners for the construction of a trolley line in front of their properties, and to obtain a municipal franchise to operate it for a contingent fee, held contrary to public policy.—Sussman v. Porter, U. S. C. C., D. N. J., 137 Fed. Rep. 161.

38. COPYRIGHTS—Photographs.—A photograph, which is not only a light-written picture of some object, but also an expression of an idea or thought or conception of the one who takes it, is a "writing," within the constitutional sense, and a proper subject of copyright.—American Mutoscope & Biograph Co. v. Edison Mfg. Co., U. S. C. C., D. N. J., 137 Fed. Rep. 262.

39. CORPORATIONS—Right of State to Preference.—The state held not entitled to preference on its simple contract claim against an insolvent corporation for which a receiver has been appointed.—State v. Williams, Md., 61 Atl. Rep. 297.

40. CRIMINAL LAW—Insanity as a Defense.—On an issue of insanity, pleaded as a defense to murder, defendant held entitled to show that his ancestors or relatives had been insane.—Commonwealth v. Johnson, Mass., 74 N. E. Rep. 939.

41. CRIMINAL LAW—Lapse of Sentence as to Escaped Prisoner.—A convict who escapes before the completion of his term of imprisonment is not entitled to an allowance of the time while he is so at large on his sentence, and no lapse of time will affect its validity and effectiveness as a basis for extradition proceedings.—*Ex parte* Moebus, U. S. C. C., D. N. H., 137 Fed. Rep. 154.

42. CURTESY—Agreement to Relinquish.—That a husband agreed with his wife to relinquish his curtesy, in reliance on which she devised lands irrespective of his rights, did not estop him from subsequently setting them up.—McCrary v. Biggers, Oreg., 81 Pac. Rep. 856.

43. DAMAGES—Physician's Evidence.—In an action for injuries to a passenger evidence of her physician that it was reasonably certain that a shock of the kind she suffered would cause undue menstruation was inadmissible.—Farnham v. Interurban St. Ry. Co., 94 N. Y. Supp 364.

44. DAMAGES—Prospective Profits.— In an action for breach of a contract to construct a water pipe line, profits which plaintiffs would have made if the contract had been carried out held too speculative and doubtful for allowance.—Smith & Benham v. Curran & Hussey, U. S. C. C., W. D. Pa., 138 Fed. Rep. 150.

45. DEEDS—Character of Conveyance.—On an issue as to whether a deed was intended as a conveyance or security, the intention of the parties is the infallible test; such intention to be gathered from all the surrounding circumstances.—Miller v. Miller, Md., 61 Atl. Rep. 210.

46. DEEDS—Title Conveyed.—General warranty deed conveying a strip of land to a railroad for a right of way, will not vest absolute title in the company, but the interest is limited by the use for which the land is acquired.—Abercrombie v. Simmons, Kan., 81 Pac. Rep. 208.

47. DEPOSITIONS—Limiting Number of Witnesses.—A party will not be limited in advance as to the number of witnesses whose testimony he may take by deposition, unless it appears from the nature of the issues that the number is unreasonable and unnecessary. — Carrara Paint Agency Co. v. Carrara Paint Co., U. S. C. C., N. D. Ill., 137 Fed. Rep. 319.

48. DISCOVERY—Production of Documents.—Corporation ought not to be required to produce its books upon the examination of one of its officers before trial, except to enable him to refresh his recollection.— Bruen v. Whitman Co., 94 N. Y. Supp. 304.

49. DIVORCE—Custody of Children.—In a suit by the husband, praying that he be awarded a judgment of separation from bed and board, plaintiff held entitled to the custody of the children, subject to the right of the defendant to see them.—Knoll v. Knoll, La., 38 So. Rep. 523.

50. DIVORCE— Violence and Threats. — Violence and threats against the wife held not to constitute willful desertion by husband, where they were not living together at the time.—Corson v. Corson, N. J., 61 Atl. Rep. 157.

51. EASEMENTS—Way of Necessity.—Where land sold out of a tract is surrounded on three sides by land of private individuals, the sale carries with it by presumption of law a right of way over the remaining land of the grantor to a public highway.—Brown v. Kemp, Oreg., 81 Pac. Rep. 236.

52. EJECTMENT—Purchasers Pendente Lite.—An officer executing a writ of possession on a judgment in ejectment held entitled to oust persons wrongfully using a right of way over the land, under a purchase from defendants in suit *pendente lite*.—King v. Davis, U. S. C. C., W. D. Va., 137 Fed. Rep. 222.

53. ELECTRICITY—Negligent Turning On.—Defendant held liable for injury to a printing press in turning on electric power in a motor by which the press was operated.—American Colortype Co. v. James Reilly's Sons Co., 94 N. Y. Supp. 498.

54. ESTOPPEL— Miner's Lien. — Owner of mine held estopped to show his title as a defense to the assertion of miners' liens.—Eastwood v. Standard Mines & Milling Co., Idaho, 81 Pac. Rep. 382.

55. EVIDENCE—Credibility of Witnesses.—The belief or opinion of a witness to the effect that certain other persons would swear to the truth was not admissible.—Hardin v. St. Louis Southwestern Ry. Co. of Texas, Tex., 88 S. W. Rep. 440.

56. EVIDENCE—Proving by Parol the Contract of Carriage.—It is competent to prove by parol, aside from the ticket sold, the contract between the carrier and the passenger.—Pennsylvania Co. v. Loftis, Ohio, 74 N. E. Rep. 179.

57. EXECUTION—Foreign Judgments.—That a foreign judgment sued on was not properly authenticated held not an objection which could be urged to defeat the validity of a sale of real estate under the attachment.—Williams v. Bennett, Ark., 88 S. W. Rep. 600.

58. EXECUTION—Levy where Title is Held in Name of Another.—Where title to land has never been in the judgment debtor, but is held by another on secret trust, it is not subject to sale under execution, but can be reached only in equity.—Macfarlane v. Dorsey, Fla., 38 So. Rep. 512.

59. EXECUTION—Power of Court to Control Execution.—Though a court of law has no power after the term to vacate its judgment, except for errors of fact available under a writ of error *coram nobis* or on *audita querela*, it has power to control its execution to prevent injustice.—King v. Davis, U. S. C. C., W. D. Va., 137 Fed. Rep. 222.

60. EXECUTORS AND ADMINISTRATORS—Accounting of Executor.—Where the employment of an accountant was suggested by testator in his will, on an accounting by the executor, it was not error to allow an amount paid to an accountant.—*In re* Arnton, 94 N. Y. Supp. 471.

61. EXECUTORS AND ADMINISTRATORS—Deed to Third Party.—The validity of an executor's sale of land is not affected by the fact that the deed was made to the husband of the successful bidder at her request, even though the purchase price was paid by the wife.—West v. Burgie, Ark., 88 S. W. Rep. 557.

62. EXECUTORS AND ADMINISTRATORS—Specific Performance.—It could not be presumed in support of a decree of a probate court enforcing specific performance of a contract by deceased in his lifetime to convey a water right that the contract was in writing.—Bullerdick v. Hermsmeyer, Mont., 81 Pac. Rep. 334.

63. FEDERAL COURTS—Enjoining Enforcement.—Federal jurisdiction, in a suit to enjoin enforcement of city ordinances, cannot be predicated on an allegation that in passing the ordinances the city exceeded its charter powers.—Glucose Refining Co. v. City of Chicago, U. S. C. C., N. D. Ill., 138 Fed. Rep. 209.

64. FEDERAL COURTS—Jurisdiction.—Where the original petition contains the requisite averments to give a federal court jurisdiction, such jurisdiction is not lost because an amended petition alleges plaintiff's citizenship in the present tense only.—Toledo Traction Co. v. Cameron, U. S. C. C. of App., Sixth Circuit, 137 Fed. Rep. 48.

65. FIRE INSURANCE—Ownership of Property.—Insurer, by asking no questions as to condition of insured's title and issuing the policy to him, held to have waived a provision of the policy invalidating the same in case insured's interest was other than a fee simple.—Glen Falls Ins. Co. v. Michael, Ind., 74 N. E. Rep. 964.

66. FIRE INSURANCE—Unauthorized Companies.—A policy holder in a fire insurance company not authorized to transact business in the state is not *in pari delicto* with the company or its agents.—Latham Mercantile & Commercial Co. v. Harrod, Kan., 81 Pac. Rep. 214.

67. FORGERY—Fraudulent Intent.—An indictment for forgery of a check, failing to allege that the check was uttered knowing the same to be false, altered, forged or counterfeited, is insufficient.—State v. Swensen, Idaho, 81 Pac. Rep. 379.

68. FRAUDS, STATUTE OF—Agreement for Lien on Lands.—An agreement between administrator and another holding balance of interest in the estate for a lien on lands thereof in favor of the administrator held void under the statute of fraud.—Tucker v. S. Ottenheimer Estate, Oreg., 81 Pac. Rep. 360.

69. FRAUDS, STATUTE OF—Oral Agreement that Marriage Should Cancel Debt.—An oral agreement, in consideration of marriage, that after marriage a debt of one to the other shall be mutually regarded as paid, held fully performed when the marriage takes place.—Weld v. Weld, Kan., 81 Pac. Rep. 183.

70. GUARANTY—Discharge of Guarantors.—Where a contract of guaranty was changed without the guarantor's knowledge, that the indebtedness accrued before the alteration cannot preclude the guarantors from insisting on their discharge.—John A. Tolman Co. v. Hunter, Mo., 88 S. W. Rep. 686.

71. HIGHWAYS—Purchaser of Land Without Notice.—Unless record of road affords notice of its existence, the purchaser of land without actual notice of a road thereon takes his land free from the easement of the right of way.—Lieber v. People, Colo., 81 Pac. Rep. 270.

72. HOMESTEAD—Rights of Creditors.—A judgment creditor of husband held not entitled to subject to lien vendor's lien notes gven the wife on sale of homestead.—Howard v. Mayher, Tex., 88 S. W. Rep. 409.

73. HOMICIDE—Provoking Quarrel.—Where one, without provocation, provokes a quarrel with another for the purpose of killing him, and does kill him, with the malicious intention of taking life, he is guilty of murder.—Kyle v. People, Ill., 74 N. E. Rep. 146.

74. HUSBAND AND WIFE—Deed by Wife.—The execution of a policy on certain real estate in the name of a wife after she conveyed the property to her husband held not to show that the deed was not intended as a conveyance.—Tyler v. Currier, Cal., 81 Pac. Rep. 319.

75. HUSBAND AND WIFE—Right to Custody of Wife.—A husband is entitled to the custody of his wife and to use force against her father to obtain custody of her, and is guilty of manslaughter only, on killing the father while under excitement growing out of the difficulty.—Cole v. State, Tex., 88 S. W. Rep. 341.

76. HUSBAND AND WIFE—Suitable Residence.—That a husband and wife lived together in a certain house is *prima facie* evidence that it was a suitable residence with reference to the husband's means.—Sultan v. Misrahi, 94 N. Y. Supp. 519.

77. INFANTS—Right of Chancery to Order Sale of Land.—A court of chancery has power, by virtue of its general jurisdiction over the estates of infants, to order such an estate sold, when it is in danger of being lost by sale for taxes and other assessments which the owners have no means to pay.—King v. King, Ill., 74 N. E. Rep. 89.

78. INJUNCTION—Encroachment on Exclusive Agency.—Where plaintiff has exclusive agency for sale of articles manufactured by another within certain territory, to determine profits derived from sales made by third party invading such territory, offending party can offset expenses in making them.—Corbin v. Taussig, U. S. C. C., E. D. Pa., 137 Fed. Rep. 151.

79. INJUNCTION—Police Interference with Business.—Police officers held not authorized to subject plaintiff to unreasonable or unnecessary inspections, interfere with his customers or visitors, or station themselves permanently in front of his place of business, so long as the law is not violated.—Cranshaw v. McAdoo, 94 N. Y. Supp. 386.

80. INTOXICATING LIQUORS—Liability on Dealer's Bond.—Surety company may recover from undisclosed principal the amount it was compelled to pay on liquor tax bond issued on application of agent of such principal.—City Trust, Safe Deposit & Surety Co. of Philadelphia v. American Brewing Co., N. Y., 74 N. E. Rep. 948.

81. JUDGMENT—Proof of Foreign Judgment.—A judgment of a foreign state may be proved by a witness who has compared the copy offered in evidence with the original record entry thereof.—St. Louis Expanded Metal Fireproofing Co. v. Beilharz, Tex., 88 S. W. Rep. 512.

82. JUSTICES OF THE PEACE—Appeal Bond.—Where respondent on appeal from a justice excepts to appeal bond, he may waive the justification, or appoint a new undertaking and waive justification of the new sureties. —Snyder v. Wooden, Idaho, 81 Pac. Rep. 877.

83. LANDLORD AND TENANT—Account Stated.—A judgment for defendant in an action on an account stated is no bar to an action based on the matter in reference to which it was claimed there was an account stated.—Tuck v. Rottkowsky, 94 N. Y. Supp. 1112.

84. LANDLORD AND TENANT — Defective Premises.— Where plaintiff stepped on a grating in a sidewalk in front of a snow window to examine the display of goods in the window, and was injured by the defective condition of the grating, the occurrence of the accident itself raised a presumption of negligence on the part of the occupant of the property.—Weber v. Lieberman, 94 N. Y. Supp. 460.

85. LIFE INSURANCE—Instruction as to Whom Policy was Issued.—The word "issue," as used in an instruction in an action on a policy, held to mean preparing and signing a policy for delivery.—Dargan v. Equitable Life Assur. Soc. of United States, S. Car., 51 S. E. Rep. 125.

86. LOTTERIES—Instructions.—In a prosecution for aiding and assisting in the establishment of a "policy," an instruction held not objectionable for failure to require that defendant's acts must have been "feloniously" committed.—State v. Cronin, Mo., 88 S. W. Rep. 604.

87. MALICIOUS PROSECUTION—Acting Under Advice of Counsel.—In a suit for malicious prosecution, whether, defendant acted under advice of counsel and made a full disclosure of the facts to counsel is a question of fact for the jury.—Wells v. Parker, Ark., 88 S. W. Rep. 602.

88. MASTER AND SERVANT—Duration of Relation.—A day laborer held to occupy towards his master the relation of servant while going to get his dinner pail after the day's work was done.—Taylor v. George W. Bush & Sons Co., Del., 61 Atl. Rep. 236.

89. MASTER AND SERVANT—Injuries to Brakeman.—A railroad is not required to expressly warn trainmen that the upright sides of a bridge of standard width are dangerously near the track.—Cleveland, C. C. & St. L. Ry. Co. v. Haas, Ind., 74 N. E. Rep. 1003.

90. MASTER AND SERVANT—Injuries to Servant.—In an action for injuries to a servant by the bursting of a belt, plaintiff held not guilty of contributory negligence as a matter of law in remaining at work, relying on the promise of his foreman to furnish a new belt.—Maryland Steel Co. v. Engleman, Md., 61 Atl. Rep. 814.

91. MASTER AND SERVANT—Master's Duty to Inspect Street Cars.—A street railroad company held liable for injuries to a servant arising from defective inspection. —Crawford v. United Rys. & Electric Co. of Baltimore, Md., 61 Atl. Rep. 287.

92. MASTER AND SERVANT—Protection Against Landslide.—Master, engaged in working a clay bank, held not bound to remove the top of the bank in order to guard against an unanticipated landslide.—Reilly v. Troy Brick Co., 94 N. Y. Supp. 576.

93. MECHANICS' LIENS — Failure to Strictly Perform Contract.—Building contractor, who has merely failed unintentionally to perform unimportant details, held entitled to a lien for the value of labor and materials, not exceeding the stipulated price.—Burke v. Coyn, Mass., 74 N. E. Rep. 942.

94. MORTGAGES—Action to Redeem from Liability on Recognizance.—Where land is conveyed to indemnify defendant for liability on a recognizance, and no further legal liability exists, defendant is only entitled to reimbursement for any sums paid under the recognizance, with interest.—Morris v. Hulme, Kan., 81 Pac. Rep. 169.

95. MORTGAGES — Consideration. — Valuable services rendered by a mortgagor to a mortgagee contitutes a consideration for satisfaction of the mortgage.—Sherman v. Matthieu, 94 N. Y. Supp. 565.

96. MUNICIPAL CORPORATIONS—Reasonable Care in Maintaining Sidewalks. — A municipal corporation is bound to guard only against such damages as can or ought to be anticipated in the exercise of reasonable prudence and care.—Ibbeken v. City of New York, 94 N. Y. Supp. 568.

97. MUNICIPAL CORPORATIONS—Rights of Purchasers of Municipal Bonds.—Purchasers of bonds take the same subject to the law in force at the time of their issuance, including the constitutional limitation upon the taxing power of the city.—City of Austin v. Cahill, Tex., 88 S. W. Rep. 542.

98. MUNICIPAL CORPORATIONS—Street Improvement Ordinance.—Separate ordinances authorizing the construction of separate street improvements held not void on the ground that the improvements were but parts of one system and should have been included in a single ordinance.—Ton v. City of Chicago, Ill., 74 N. E. Rep. 1044.

99. MUNICIPAL CORPORATIONS — Validity of Bonds Issued by De Facto Corporation.—Where bonds of a *de facto* municipal corporation were subsequently assumed as provided by statute by the corporation as reorganized, the bonds were valid.—Bradford v. Westbrook, Tex., 88 S. W. Rep. 382.

100. MUNICIPAL CORPORATIONS—Validity of Paving Ordinance.—A paving ordinance held not invalid, as vesting in the city engineer power to designate material to be used in grading.—Guyer v. City of Rock Island, Ill., 74 N. E. Rep. 105.

101. NEGLIGENCE—Care Required.—Where the invitation of the owner of a building leads a person into the basement thereof, the owner is liable for a failure to exercise reasonable care to prevent such person from falling into an ash pit there.—Withers v. Brooklyn Real Estate Exch., 94 N. Y. Supp. 328.

102. NEGLIGENCE—Doctrine of Discovered Peril.—The doctrine of discovered peril has no application, in the absence of actual and timely knowledge on the part of the person causing the injury of the peril of the person injured.—Cardwell v. Gulf, B. & G. N. Ry. Co., Tex., 88 S. W. Rep. 422.

103. NEGLIGENCE—Fellow Servants.—Where plaintiff was injured by the agency of fellow employees and defendant company, the presence and assistance of the act of the fellow servants held not to exculpate the other agency.—Ray v. Pecos & N. T. Ry. Co., Tex., 88 S. W. Rep. 466.

104. NUISANCE—Diseased Animals. — A railway company, which maintains a passageway for the driving of infected cattle from the Indian Territory into Kansas, may be enjoined in an action by the state to abate a public nuisance.—State v. Missouri Pac. Ry. Co., Kan., 81 Pac. Rep. 212.

105. PARTNERSHIP—Assets on Dissolution.—A partner, contributing to the partnership certain contracts, held not entitled to the same on dissolution of the partnership.—Arthur v. Sire, 94 N. Y. Supp. 346.

106. PARTNERSHIP—Evidence as to the Relation.—On an issue of partnership, statements of one partner made in the absence of the other held inadmissible against the latter.—Bailey v. Fritz Bros., Ark., 88 S. W. Rep. 569.

107. PARTNERSHIP — Profit Sharing. — One held not necessarily a partner because of agreement that he shall share in the profits of a business.—Beard v. Rowland, Kan., 81 Pac. Rep. 188.

108. PATENTS—Contributory Infringement.—A notice conspicuously placed on a patented machine that it is sold subject to a license restriction that it shall be used only with supplies furnished by the licensor is binding on a purchaser and user of the machine.—Cortelyou v. Charles Eneu Johnson & Co., U. S. C. C., S. D. N. Y., 138 Fed. Rep. 110.

109. PATENTS—Sufficiency of Description. — Where a patentee has pointed out such features as he claims are his invention with sufficient clearness to enable them to be understood by those skilled in the art, the law affords

him protection.—Shepherd v. Deitch, U. S. C. C., S. D. N. Y., 138 Fed. Rep. 83.

110. PERJURY—In Procuring Marriage License.—In a prosecution for false swearing in obtaining a marriage license, defendant held entitled to a certain instruction relative to the effect of his ignorance of the contents of the statements alleged to be false.—Porter v. State, Tex., 88 S. W. Rep. 359.

111. PRINCIPAL AND AGENT—Proof of Agency.—Agency may not be established by the declarations of an alleged agent, nor can his admissions and statements bind the principal until the agency is shown.—Higley v. Dennis, Tex., 88 S. W. Rep. 400.

112. PRINCIPAL AND AGENT—Undisclosed Principal.—In an action against an agent of an undisclosed principal and the principal, evidence held admissible and sufficient to make out a case against both the agent and principal.—Pittsburg Plate Glass Co. v. Roquemore, Tex., 88 S. W. Rep. 449.

113. PRINCIPAL AND SURETY—Discharge of Surety.—Where a new agreement between a debtor and creditor is that the debtor shall pay, at the end of a period agreed on for an extension, precisely the same sum due at the time the agreement was entered into, the surety is nevertheless released.—De Barrera v. Frost, Tex., 88 S. W. Rep. 476.

114. QUIETING TITLE—Partial Failure of Title.—A vendee, entitled to an abatement of the price, to the extent of the relative value of the land to which the vendor was unable to make title, held not prejudiced thereby.—Bradley v. Bell, Ala., 38 So. Rep. 759.

115. RAILROADS—Abandonment of Station.—Where a railroad has located and constructed its line, it cannot abandon the same or abolish a depot in a town situated thereon, except in case of imperious necessity.—State v. Mobile, J. & K. C. R. Co., Miss., 38 So. Rep. 732.

116. RAILROADS—Franchise and Charter Rights.—A contract made under a franchise cannot reach beyond the rights acquired by the franchise itself and afford immunity from public duties.—Louisiana & Northwest R. Co. v. State, Ark., 88 S. W. Rep. 559.

117. RAILROADS—Right of Way Over Public Land.—Where a railroad company was chartered in 1866, and authorized to condemn private property for a right of way, it was impliedly authorized to construct its line over the public domain.—Ayres v. Gulf, C. & S. F. Ry. Co., Tex., 88 S. W. Rep. 436.

118. RAILROADS—Speed at Crossing.—Where a railroad company has erected gates at a dangerous crossing, it is its duty to slacken speed when the watchman is off duty and the gates open.—Schwarz v. Delaware, L. & W. R. Co., Pa., 61 Atl. Rep. 255.

119. RAILROADS—Use of Track by Pedestrian.—Locomotive engineer is bound to be on the lookout for persons using the track at a place where they are accustomed to use it, but it is not chargeable with notice that a man is likely to be lying on the track at such a place.—Ayers v. Wabash R. Co., Mo., 88 S. W. Rep. 698.

120. RECEIVERS—Answer Under Oath.—An answer under oath may be used as an affidavit on a motion for the appointment of a receiver, and if such answer is not waived by the bill, and denies all the material allegations thereof, it can only be overcome by the evidence of two witnesses or its equivalent.—Ford v. Taylor, U. S. C. C., D. Nev., 137 Fed. Rep. 149.

121. RECEIVERS—Wife's Separate Property.—In a suit by a wife to cancel a deed of trust given by her and her husband on her separate property to secure his debt, held, that the appointment of a receiver to collect the rents was proper.—De Barrera v. Frost, Tex., 88 S. W. Rep. 476.

122. RELEASE—Good Faith as Affecting Validity.—Good faith on the part of a wrongdoer and a full understanding on the part of a person injured as to his legal rights held indispensable to the validity of a release of claim for the injuries.—Kansas City, M. & B. Ry. Co. v. Chiles, Miss., 38 So. Rep. 498.

123. REMOVAL OF CAUSES—Time for Removal.—The law is well settled that an amendment to a complaint in the state court, which transfer forms a nonremovable case into a removable one, gives the defendant the right to remove, if he acts promptly.—Myrtle v. Nevada, C. & O. Ry. Co., U. S. C. C., D. Nev., 137 Fed. Rep. 198.

124. REPLEVIN—Description of Property.—Judgment in claim and delivery held not so vague and uncertain in the description of the property as to render it impossible for defendant to identify and return the same.—McGregor v. Lang, Mont., 81 Pac. Rep. 348.

125. SALES—Performance of Condition.—The condition precedent to cancellation of a contract of purchase and turning of the goods over to another, that an "immediate" wire routing be given, held not performed by sending a telegram after a delay of a day.—Van Camp Packing Co. v. Smith, Rouse & Webster, Md., 61 Atl. Rep. 284.

126. SALES—Quality of Lumber Sold in Pile.—Where a buyer purchased a pile of lumber as it stood, the questions of quality and grade were immaterial in an action to recover the purchase price.—Patch v. Smith, 94 N. Y. Supp. 692.

127. SALES—Stipulations for Rescission.—Contract for the sale of buildings and their demolition by the buyer construed with reference to its stipulations for avoidance by the buyer in case of the seller's failure to have title on a certain date.—Lippman v. Hauben, 94 N. Y. Supp. 520.

128. SALES—Warranties.—A warranty on the sale of a chattel need not be the sole inducement to the purchase, in order to give the purchaser a right of action for its breach; but it must have been operative in causing the sale.—Mitchell v. Pinckney, Iowa, 104 N. W. Rep. 286.

129. SCHOOLS AND SCHOOL DISTRICTS—Objection to Certificate of Tax Levy.—The objection that the certificate of levy of school taxes is not under seal as required by statute is not available on suit for injunction to restrain the collection of taxes.—Schmohl v. Williams, Ill., 74 N. E. Rep. 75.

130. SCHOOLS AND SCHOOL DISTRICTS—Review of Decision of Directors.—A decision of school directors that certain children are not residents of the district and entitled to attend school therein cannot be reviewed by a court and jury.—Commonwealth v. Wenner, Pa., 61 Atl. Rep. 247.

131. SEAMAN—Lien for Wages.—Where it appears that persons are employed on vessels as pilots, and are not performing the duties of masters, but are engaged solely in the navigation of the vessel, they are entitled to liens for their wages.—The Pauline, U. S. D. C., S. D. N. Y., 138 Fed. Rep. 271.

132. SHIPPING—Torts of Master and Crew.—A vessel is liable for a tortious act of her master or a member of her crew on board in her service, by which another is injured, although committed without the authority or knowledge of the owners.—The Bulley, U. S. D. C., S. D. N. Y., 138 Fed. Rep. 170.

133. SPECIFIC PERFORMANCE—Mistake in Contract.—Specific performance will not be decreed of a written contract to buy land, which on account of a mistake does not accurately express the terms really agreed upon by the parties.—Somerville v. Coppage, Md., 61 Atl. Rep. 318.

134. STREET RAILROADS—Abbreviations Used in Tax Assessment Roll.—Abbreviations used to describe certain property of a railroad held not insufficient *per se*, so as to justify a vacation of the assessment on a writ of review.—Oregon R. & Nav. Co. v. Umatilla County, Oreg., 81 Pac. Rep. 352.

135. STREET RAILROADS—Collision with Automobile.—Act of motorman on standing street car in signaling automobile, which was subsequently struck by passing car, held not negligent.—Hirsch v. Interurban St. Ry. Co., 94 N. Y. Supp. 320.

136. STREET RAILROADS—Collision with Team.—Whether one driving along a street was guilty of con-

tributory negligence in confining his attention to his driving, while his companion looked out for approaching street cars, held a question for the jury.—Indianapolis St. Ry. Co. v. Slifer, Ind., 74 N. E. Rep. 19.

137. SUBROGATION—Necessary Parties.—Where one was subrogated to a judgment lien, all persons interested in the judgment were entitled to be heard on their equity.—Boice v. Conover, N. J., 61 Atl. Rep. 159.

138. SUNDAY—Baseball Games.—Baseball games proposed to be played on Sunday held "public games," in violation of Pen. Code, §§ 259, 260, 265, and hence complainants were not entitled to restrain police authorities from interfering therewith.—Brighton Athletic Club v. McAdoo, 94 N. Y. Supp. 391.

139. TAXATION — Designation of Separate Pieces of Property.—Where a taxpayer is assessed for several separate pieces of property, it is not necessary that its name should be entered on the roll opposite each piece.—Oregon R. & Nav. Co. v. Umatilla County, Oreg., 81 Pac. Rep. 352.

140. TELEGRAPHS AND TELEPHONES—Mental Suffering as Element of Damage.—Action to recover for mental suffering caused by failure to deliver telegram sent from Virginia to South Carolina held maintainble in South Carolina.—Harrison v. Western Union Telegraph Co., S. Car., 51 S. E. Rep. 119.

142. TRADE-MARKS AND TRADE-NAMES—Unfair Competition.—Although unfair competition by simulating the dress of complainant's goods is apparently shown, a preliminary injunction will not be granted, where it appears that defendant has publicly used the same dress for many years.—Von Mumm v. Steinmetz, U. S. C. C., S. D. N. Y., 137 Fed. Rep. 168.

143. TREATIES—Rules of Construction.—A treaty between nations should be given a reasonable, rather than a liberal, construction, and there is no authority for reading into it, under the guise of construction, extraordinary provisions not necessary to give full effect to the intention expressed.—The Neck, U. S. D. C., W. D. Wash., 138 Fed. Rep. 144.

144. TRESPASS—Petitory and Possessory Action.—If the owner of the land is annoyed, and his possession infringed upon by a trespasser, his action may be for trespass, and he may in that connection exhibit his title.—Bossier's Heirs v. Jackson, La., 38 So. Rep. 525.

145. TRIAL—Direction of Verdict.—A trial judge in a federal court is not entitled, on his own view of the evidence, to direct a verdict, where there is a positive conflict in the evidence on an issue material to the controversy.—Minahan v. Grand Trunk Western Ry. Co., U. S. C. C. of App., Sixth Circuit, 138 Fed. Rep. 37.

146. TRIAL—Failure to Request More Explicit Instruction.—Where a party failed to request a more explicit instruction than the one given on a certain issue, he could not complain on appeal.—Mitchell v. Pinckney, Iowa, 104 N. W. Rep. 286.

147. TRIAL—Misconduct of Counsel.—It is highly improper for counsel to persist in repeatedly asking a question which has been excluded.—Quinn v. New York City Ry. Co., 94 N. Y. Supp. 560.

148. TRIAL—Separation of Issues. — In submitting a case, the court should definitely state the issues of fact made by the pleadings, with instructions as to each issue.—Baltimore & O. R. Co. v. Lockwood, Ohio, 74 N. E. Rep. 1071.

149. TROVER AND CONVERSION—Natural Gas.—Natural gas held to be personal property, so that, when gas is extracted from pipe line and consumed, the act constitutes a conversion.—Crystal Ice & Cold Storage Co. v. Marion Gas Co., Ind., 74 N. E. Rep. 15.

150. TRUSTS—Creation by Parol.—Where plaintiff sues as trustee of an express trust, a stranger to the trust agreement has no standing to contend that it is void because not in writing.—Mallory v. Thomas, Kan., 81 Pac. Rep. 194.

151. TRUSTS—Husband and Wife.—Purchase of land by husband with his own funds in the name of his wife will be presumed to have been intended as a gift or advancement.—Rowe v. Johnson, Colo., 81 Pac. Rep. 268.

152. TRUSTS—Resulting Trusts.—Where a conveyance is made as a security for a loan by the grantee to a third person, who is equally the purchaser, a resulting trust is established in his favor.—Miller v. Miller, Md., 61 Atl. Rep. 210.

153. TRUSTS—Stock Dividends.—A dividend in stocks out of surplus net earnings of a corporation held income, and not principal, as between life tenants and remaindermen.—Safe Deposit & Trust Co. v. White, Md., 61 Atl. Rep. 295.

154. TRUSTS—Title in Name of Another.—Beneficiarie of a resulting trust held not precluded from enforcing the same because the creator purchased the property in name of the trustee to defeat any claim of his wife to alimony.—Lufkin v. Jakeman, Mass., 74 N. E. Rep. 983.

155. VENDOR AND PURCHASER—Constructive Notice.—A person may rest upon the constructive notice which the record of his title imparts, and is under no duty to give any other notice to anyone who deals with other parties as to such property. — Eastwood v. Standard Mines & Milling Co., Idaho, 81 Pac. Rep. 382.

156. VENDOR AND PURCHASER — Contract of Sale.—Where the purchaser in a mutually binding contract for the sale and purchase of land accepts and acts upon it, his omission to sign it is immaterial.—Brownson v. Perry, Kan., 81 Pac. Rep. 197.

157. VENDOR AND PURCHASER — Knowledge of Prior Conveyance.—That a lease was improperly acknowledged does not render it ineffective as against a subsequent grantee with actual notice.—Ladnier v. Stewart, Miss., 38 So. Rep. 748.

158. VENDOR AND PURCHASER—Vendor's Liens.—Vendors of real estate held entitled to a lien to the extent of money paid to the holder of a mortgage the vendees had agreed to assume on release a collateral mortgage on other property.—Bach v. Kidansky, 94 N. Y. Supp. 752.

159. VERDICT—Technical Errors. — Where the verdict was in technical disregard of the instructions, the court should merely have entered a paper judgment and denied a new trial; it being clear what was meant by the verdict.—Wallerich v. Puget Sound Warehouse Co., Wash., 80 Pac. Rep. 763.

160. WATERS AND WATER COURSES — Deprivation of Riparian Rights.—A riparian proprietor has a property right in the full flow of the water of the stream, of which he cannot be unwillingly deprived without condemnation and compensation.—Gray v. Village of Ft. Plain, 94 N. Y. Supp. 698.

161. WILLS — Construction.—Where a will created a trust in favor of testator's daughter, with remainder in the *corpus* on her death, held, that only those specified, surviving at her daughter's death, took under the will.—*In re* Stocum's Will, 94 N. Y. Supp. 588.

162. WILLS—Provision in Lieu of Dower.—Where a will gave testator's widow certain realty and a legacy from "the remainder of the estate" in lieu of dower, she was not entitled to interest on the legacy from the date of the husband's death.—*In re* Martens, 94 N. Y. Supp. 296.

163. WILLS—Right to Claim Under Will.—Where a will devised land in fee, and the devisor subsequently conveyed the same land to the devisee named in the will one claiming under the devisee was entitled to rely on both the will and the deed to establish her title.—Woodward v. Woodward, Colo., 81 Pac. Rep. 322.

164. WITNESSES—Cross Examination as to Prior Conversations.—In a prosecution for homicide, defendant held properly required to answer on cross-examination whether he had not had a prior conversation with certain others, and had not then had in mind the killing of his wife.—Smith v. State, Ind., 74 N. E. Rep. 983.

165. WITNESSES—Defendant as a Witness.—A defendant who offers himself as a witness may be asked on cross-examination whether he has been convicted of assault and as to the particulars thereof.—State v. Mount, N. J., 61 Atl. Rep. 259.